STATE OF MICHIGAN

COURT OF APPEALS

BARNITUS ALBAN WONG, Plaintiff-Appellant, v SALLY ANITA LEE, Defendant-Appellee.	UNPUBLISHED April 26, 2005 No. 255616 Wayne Circuit Court LC No. 95-524618-DM
BARNITUS ALBAN WONG, Plaintiff-Appellant, v SALLY ANITA LEE, Defendant-Appellee.	No. 255763 Wayne Circuit Court LC No. 95-524618-DM

Before: Griffin, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

In Docket No. 255616, plaintiff appeals by leave granted the trial court's order delineating a new parenting time schedule, denying any makeup parenting time, and providing for the award of attorney fees for any future unreasonable violation of the parenting time schedule necessitating court intervention. In Docket No. 255763, plaintiff appeals as of right the trial court's determination, within this same order, that plaintiff failed to demonstrate either proper cause or a change of circumstances to support a change of custody. We affirm.

Docket No. 255616

Plaintiff first argues that the trial court exceeded its authority or otherwise erred in restructuring the parenting time schedule and, in doing so, decreasing plaintiff's parenting time. We disagree.

In cases involving child custody, this Court applies three different standards of review. See MCL 722.28. We review a trial court's findings of fact under the great weight of the

evidence standard and apply an abuse of discretion standard to discretionary rulings of the court. *Foskett v Foskett*, 247 Mich App 1, 4-5; 634 NW2d 363 (2001). Questions of law, however, are reviewed for clear legal error to determine whether the trial court correctly chose, interpreted, and applied the law. *Phillips v Jordan*, 241 Mich App 17, 20; 614 NW2d 183 (2000).

It is unquestioned that the best interests of the child are to guide and govern a trial court's determination regarding parenting time. *Deal v Deal*, 197 Mich App 739, 742; 496 NW2d 403 (1993); MCL 722.27a(1). To ascertain what is in the best interests of a child in such circumstances, the trial court is required to consider the factors set forth in MCL 722.23. MCL 722.27a(1). Contrary to plaintiff's assertion, the trial court did not base its determination to modify the parenting time schedule solely on the confusing nature of the original custody order, but also a finding that the confusion that emanated from that order was impacting the minor child in a negative manner and perpetuating the inability of plaintiff and defendant to cooperate for the benefit of their child. Review of the trial court's ruling also demonstrates that this finding stemmed from its consideration of the best interests of the child. Specifically, the trial court noted that the inability of the parties to communicate and constant disputes regarding the minor child's schedule have resulted in the child's school performance having "suffered," and that the parties' inability to cooperate without a parenting time coordinator or court intervention has resulted in "additional stress" to the child, necessitating the imposition of a "fixed and certain" parenting time schedule. See MCL 722.23(h). The trial court's findings and concerns regarding the minor child's school performance and behavior are supported by evidence from the child's former classroom teacher and counselor, who recommended that, in addition to continuing participation in therapy, the minor child be provided a "structured school environment, minimal transitions between his parents, and a regular routine."

The trial court also noted that "neither party is capable of facilitating and encouraging a close and continuing parent-child relationship between the child and the non-custodial parent." Implicit in the trial court's ultimate determination regarding a parenting time schedule is the impression of the trial court that imposition of a regular and fixed schedule was an absolute necessity to foster plaintiff's and defendant's ability to communicate. See MCL 722.23(j). The trial court further took note of the inability, as demonstrated by the prior seven years of contention and court appearances, of the parties to agreeably comply with the prior parenting time order given its ambiguity and the failure of the parties, court and mediator to agree on how the order should be interpreted. MCL 722.23(l).

Given the ongoing history and the concurrence by both parties that the existing parenting time schedule was not functional and acted only to sustain and perpetuate ongoing disputes and contention, the trial court, based on evidence presented, evaluated the best interests of the minor child and devised a schedule that is stable and consistent, and which provides each parent with ample opportunity to maintain their individual relationship with the child while minimizing disagreements that negatively impact his emotional well-being. Because the trial court adequately considered the best interests of the minor child and did not commit a palpable abuse of discretion, the award of parenting time is not in error.

Similarly, and contrary to plaintiff's contention, the trial court did not err in the resultant decrease of his parenting time without a commensurate request by either party to reduce plaintiff's visitation. As previously noted, the only requisite that must guide the court in the determination of a parenting time schedule is the grant of parenting time "in accordance with the

best interests of the child." MCL 722.217a(1). The resulting decrease in plaintiff's parenting time was a risk assumed by the repeated failure of the parties to cooperate in the parenting of their child, and their inability to resolve conflicts without court intervention. Plaintiff's objection to the trial court's alteration of the locations and times for exchange of the minor child is similarly without merit. MCL 722.27(1)(e) authorizes the court to "[t]ake any action considered to be necessary in a particular child custody dispute." Given the recommendations presented to the trial court that the child be exposed to "minimal transitions between his parents" and the need to spare him from "conflict existing between his parents as much as possible," the trial court had a legitimate basis for structuring parenting time exchanges in a manner designed to minimize or avoid possible confrontations between the parties.[1]

Plaintiff's next argues that the trial court erred in refusing to grant makeup parenting time for visitation allegedly wrongfully denied plaintiff by defendant over the seven-year period since entry of the judgment of divorce. Specifically, plaintiff contends that the trial court erred in merely accepting the recommendation of the court-appointed psychologist to deny makeup parenting time, and that the trial court's cursory ruling on this issue fails to comply with MCR 2.517(A)(1).

Initially, we note that much of the relief sought by plaintiff is precluded by MCL 552.642(1)(b), which requires that makeup parenting time be taken within one year of the time that the denial of visitation was alleged to have occurred. Moreover, to the extent that such time is not statutorily precluded, we find that, given the parties' extensive use of a parenting time coordinator it would be difficult, if not impossible, to recreate or verify the parenting time schedule adaptations and modifications that have occurred over the requested time period. In addition, based on the repetitive filing of pleadings and motions to show cause before the lower court and friend of the court, there exists substantial risk that previously corrected parenting time denials or requested accommodations would result in one party or the other being unfairly penalized by any attempt to correct alleged wrongs that were not brought before the court in a timely manner. Further, plaintiff's delay in presenting this issue to the court is contrary to this state's public policy of encouraging prompt resolution of disputes pertaining to child custody. See MCL 722.28; see also *Curylo v Curylo*, 104 Mich App 340, 347 n 1; 304 NW2d 575 (1981). Accordingly, we find no error in the trial court's decision to forgo the grant of makeup parenting time.

In reaching this conclusion, we reject plaintiff's claim that in forgoing the grant of makeup parenting time, the trial court erroneously adopted the psychological evaluator's recommendation without making its own specific findings on this issue, as required by MCR 2.517(A). A thorough review of the trial court's ruling indicates an alternative basis for its determination, and not merely an unquestioning adoption of the evaluator's recommendation. As noted by the trial court, the prior parenting time schedule was "very confusing." The trial court's

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[1] Contrary to plaintiff's contention, the court's indication that it would provide plaintiff additional parenting time was not in reference to his existing schedule of visitation, but rather an increase from the parenting schedule recommended by the court-appointed evaluator.

refusal to grant makeup parenting time ultimately stems more from its own findings regarding the ambiguity of the order and the inability of the parties to agree on its interpretation, than a wholesale adoption of the evaluator's recommendation.

Plaintiff next argues that that the trial court erred in providing for the award of attorney fees for any future unreasonable violation of the parenting time schedule necessitating court intervention. Again, we disagree. A trial court's decision concerning the award of attorney fees is reviewed by this Court for an abuse of discretion. *Jansen v Jansen*, 205 Mich App 169, 173; 517 NW2d 275 (1994).

As noted by plaintiff, parties are typically responsible for the payment of their own attorney fees. As such, attorney fees are not recoverable as of right. Rather they are recoverable only where specifically authorized by statute, court rule, or other recognized exception. *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997). Here, contrary to plaintiff's assertion, the trial court's provision of notice to the parties that it would award attorney fees for "unreasonable" behavior by the parties in the future is consistent with the prior holdings of this Court. Indeed, this Court has long held that an award of attorney fees is permissible where a party has been forced to incur those fees as a result of the other party's unreasonable conduct in the course of the litigation. See *Milligan v Milligan*, 197 Mich App 665, 671; 496 NW2d 394 (1992); see also ; *Stackhouse v Stackhouse*, 193 Mich App 437, 445; 484 NW2d 723 (1992). In light of these holdings, and considering the persistent and uncompromising behavior of the parties in this ongoing and contentious litigation, as well as the toll such behavior has taken on the minor child, we cannot conclude that the trial court abused its discretion in forewarning the parties that continuation of their behavior would, in the future, incur financial consequences.

Moreover, we reject plaintiff's assertion that the trial court's decision in this regard effectively imposes punitive damages, which are expressly prohibited by MCR 2.114(F), for the pleading of a frivolous claim or defense. Although the order at issue here cursorily states only that "[i]n the future, attorney fees will be paid by the party who loses" a motion regarding parenting time, the trial court indicated during its opinion from the bench that such fees would be awarded only if the trial court found that the nonprevailing party's behavior in causing, bringing, or defending such a motion to be "unreasonable." As previously noted, an award of attorney fees under such circumstances is permissible. Accordingly, we will not disturb the trial court's exercise of its discretion.

Docket No. 255763

The sole issue on appeal in Docket No. 255763 is plaintiff's contention that the trial court erred in determining that plaintiff had failed to demonstrate the necessary basis for a change in custody. Plaintiff asserts that the maturational changes that have occurred for the child since entry of the original custody order, coupled with the preference of the minor child to have more time with plaintiff and the allegations pertaining to defendant's interference in the relationship between plaintiff and the minor child, were sufficient for the court to evaluate the custodial environment and conduct an evidentiary hearing on the issue of custody. We disagree.

Pursuant to MCL 722.27(1)(c), a party seeking modification or amendment of a trial court's order for custody must prove by a preponderance of the evidence the existence of proper cause or a change of circumstances before the trial court can consider whether an established

custodial environment exists. This Court has defined "proper cause" to establish sufficient necessity for modification or review of a child custody order so as to require a movant to demonstrate by a preponderance of the evidence "the existence of an appropriate ground for legal action to be taken by the trial court," i.e., a ground "relevant to at least one of the twelve statutory best interests factors, and . . . of such magnitude to have a significant effect on the child's well-being." *Vodvarka v Grasmeyer*, 259 Mich App 499, 512; 675 NW2d 847 (2003). To prove a "change in circumstances" a movant must demonstrate that, "since entry of the last custody order, the conditions surrounding custody of the child, which have or could have a significant effect on the child's well-being have materially changed." *Id*. at 513. Moreover, it has been held that:

> not just any change will suffice, for over time there will always be some changes in a child's environment, behavior, and well-being. Instead, the evidence must demonstrate something more than the normal life changes (both good and bad) that occur during the life of a child, and there must be at least some evidence that the material changes have had or will almost certainly have an effect on the child. [*Id*. at 513-514.]

The mere fact that the minor child has experienced chronological maturation since entry of the judgment of divorce is not sufficient to comprise a change in circumstances. Nor is the alleged preference of the minor child. Although a trial court must take into account the preference of a child of sufficient age in accordance with MCL 722.23(i), plaintiff provides no authority to support his assertion that consideration of the child's preference, standing alone, is sufficient to constitute proper cause or a change in circumstances to support a change in custody. *Curylo*, *supra* at 349.

While the trial court noted egregious behavior on the part of both plaintiff and defendant and their inability to facilitate the child's relationship with the other parent, the trial court indicated that the current state of events was no different than that which existed at the time of entry of the judgment of divorce. In order to secure a reevaluation of the best interest factors, it was incumbent upon plaintiff to demonstrate, by a preponderance of the evidence, the existence of either an appropriate ground for legal action to be taken by the trial court or that the child's custodial environment had materially been altered since entry of the last custody order, which could have a significant impact on the child's well-being. *Vodvarka*, *supra* at 512-513. Plaintiff failed to demonstrate either.

The problems and disputes brought by plaintiff to the trial court are the same as those that have existed, on an ongoing basis, since entry of the judgment of divorce. Plaintiff and defendant have continued their historical inability to communicate or to agree on the minor child's needs. While plaintiff has moved his residence to a closer physical proximity to the child and defendant, this alteration has not materially impacted the minor child because the difficulties experienced have never involved the physical transfer of the child or preclusive transport times, but have always been the inability of plaintiff and defendant to communicate with one another and to act in a manner that places the minor child's best interests ahead of their own self-interest and desire to punish or manipulate the other parent. These problems are long-standing in nature and do not comprise either a proper cause or a change in circumstances, because they do not require legal action or amount to a material change of the custodial conditions. Consequently,

the trial court did not err in concluding that plaintiff had not met the threshold requirement to show proper cause or a change of circumstances warranting a change or reevaluation of custody.[2]

Affirmed.

/s/ Richard Allen Griffin
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra

[2] In reaching this conclusion, we reject plaintiff's unpreserved claim that the trial court was required, pursuant to MCR 3.210(8), to conduct an evidentiary hearing to determine whether there existed proper cause or a change in circumstances to support reconsideration of custody. Contrary to plaintiff's assertion, MCR 3.210(8) requires only that the trial court, in deciding whether such a hearing is necessary, "determine whether there are contested factual issues that must be resolved in order for the court to make an informed decision on [a] motion [for a change of custody]." As noted above, the facts alleged by plaintiff in support of his motion in this regard were, in and of themselves, legally insufficient to establish either proper cause or a change in circumstances to support reconsideration of custody. Consequently, whether or not contested, these facts did not require an evidentiary hearing. See *Vodvarka*, *supra* at 512 (trial court "may accept as true the facts allegedly comprising proper cause or a change of circumstances, and then decide if they are legally sufficient to satisfy the standard).